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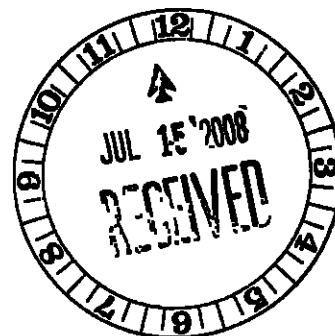
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VIA UPS OVERNIGHT MAIL

July 14, 2008

Ms. Anne Quinlan, Acting Secretary
Surface Transportation Board
395 E Street S.W.
Washington, DC 20423-0001



Re: STB Finance Docket No. 35164, BNSF Railway Company— Petition for Declaratory Order

Dear Acting Secretary Quinlan:

I am enclosing an original and ten (10) copies of the Petition for Declaratory Order in the above-referenced proceeding. Also, enclosed is a check for the filing fee in the amount of \$1,400.

Please acknowledge receipt of this letter by date-stamping the enclosed copy of this letter and returning it to me in the enclosed self-addressed stamped envelope.

If you have any questions, please contact me at (817) 352-3394.

Sincerely,

Kristy D. Clark
General Attorney

cc: Jerome Johnson
Susan Odom

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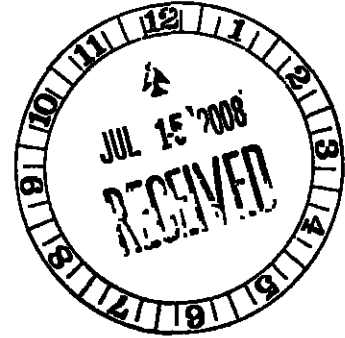
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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 35164



BNSF RAILWAY COMPANY – PETITION FOR DECLARATORY ORDER

EXPEDITED HANDLING REQUESTED

FILED

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David Rankin
Kristy Clark
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2500 Lou Menk Drive
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Dated: July 14, 2008

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO 35164



BNSF RAILWAY COMPANY – PETITION FOR DECLARATORY ORDER

INTRODUCTION

Pursuant to 5 U.S.C. § 554(e) and 49 U.S.C. § 721, BNSF Railway Company (“**BNSF**”) hereby petitions the Surface Transportation Board (“**Board**” or “**STB**”) to institute a declaratory order proceeding to terminate a controversy or remove uncertainty with respect to two track relocation projects in Oklahoma City, Oklahoma. BNSF would normally not come before the Board seeking a declaratory order for a relocation project because the law in that regard is fairly well settled. BNSF, however, is seeking a ruling from the Board in this proceeding for two reasons. First, the two track segments that are being relocated were the subject of the notice of exemption in STB Docket No. AB-6 (Sub-No 430X), *BNSF Railway Company – Abandonment Exemption – In Oklahoma County, OK* (not printed), served June 5, 2008 (“**Oklahoma City Abandonment**”), and BNSF does not want to appear to be circumventing the Board’s rejection of BNSF’s notice of exemption in that proceeding (“**Oklahoma City Abandonment Proceeding**”).

Second, as became painfully obvious in the Oklahoma City Abandonment Proceeding, there is a small group of individuals who are bound and determined to bring to a halt the Oklahoma City I-40 Crosstown Relocation project (“**Highway Project**”). In the Oklahoma City Abandonment Proceeding, these individuals sought to misuse the Board’s Office of Financial

Assistance (“**OFA**”) procedures to acquire certain BNSF rail segments that need to be moved in order to make way for the Highway Project. Even though, in BNSF’s view, the two relocation projects involved in this proceeding are not subject to the Board’s jurisdiction, Edwin Kessler (“**Kessler**”), a party to the Oklahoma City Abandonment Proceeding, is seeking to enjoin BNSF from relocating certain tracks that lie in the path of the Highway Project. On June 27, 2008, Kessler filed a First Amended Complaint For Injunctive Relief (“**Kessler Complaint**”) with the United States District Court for the Western District of Oklahoma (“**District Court**”) seeking, among other things, an order from the District Court enjoining BNSF from engaging in any “activities in the nature of salvage or alteration of the subject Line”.¹ Kessler Complaint (attached as Exhibit 1) at 21-22.

The Highway Project in the area of the BNSF tracks is on a critical path and any substantial delays caused by BNSF’s inability lawfully to relocate the two track segments could result in millions of dollars of wasteful and unnecessary cost overruns, all at taxpayers’ expense. Consequently, so as not to further delay the Highway Project, BNSF is seeking an upfront ruling from the Board that the two sets of tracks at issue in this proceeding may lawfully be relocated without any prior approval from the Board or the District Court. Also, to limit any cost overruns caused by construction delays, BNSF is seeking expedited handling of this proceeding.

I. BACKGROUND

A. HIGHWAY PROJECT

The new I-40 Crosstown Expressway is being built south of the existing highway and will stretch four and a half miles and consist of 10 lanes. Once the new highway is completed, the existing highway will be replaced with a six-lane boulevard extending into downtown

¹ The “subject Line” in the Kessler Complaint includes the two segments being relocated.

Oklahoma City. The original highway was built in 1965 and was designed to handle 76,000 vehicles per day. Today, approximately 120,000 vehicles traverse the highway each day, thus exceeding capacity by 44,000 vehicles. The new Crosstown Expressway will have the capacity to handle up to 173,000 vehicles per day.

The new highway became necessary because of the outdated design and deteriorating condition of the existing highway. For example, in 1989 one of the bridges on the existing highway attracted national attention when it was forced to close because of a crack in one of the pier beams. Because that bridge was built with a fracture critical design, the entire bridge could collapse if one piece gives way. In an August 2007 poll sponsored by an Oklahoma City newspaper, two-thirds of all respondents indicated that they were afraid to drive across the bridge. Today, the cost of inspecting that bridge is over \$1 million a year and heavier trucks are banned from using this part of the highway. Concerns over whether the bridge will last until the new highway is completed intensified on September 23, 2007, when a hole in the floor of the bridge resulted in the closure of all but one lane.

The ramps and curves on the existing highway are also substandard and the roadway has been below current engineering standards for years. Other safety problems with the existing highway include falling chunks of concrete and a lack of shoulders or breakdown lanes.

The planning for the new highway began in 1996, and over the years has included numerous Federal, state and local entities, including the Oklahoma Department of Transportation ("**ODOT**"), the Federal Highway Administration ("**FHA**"), the Federal Railroad Administration ("**FRA**") and Oklahoma City. On May 1, 2002, the FHA granted final approval for the project. The new highway is expected to open in 2012 and is currently projected to cost \$557 million.

The Highway Project is federally funded through the cooperative efforts of the entire Oklahoma delegation.

For the Highway Project to be completed, BNSF needs to relocate two segments of its Chickasha Subdivision located between milepost 541.69 and milepost 539.96 in two separate stages since the new highway will be located in the BNSF corridor for about 1.73 miles. Any significant delay in BNSF's ability to relocate those tracks will not only result in substantial cost overruns but also potentially jeopardize the safety of the traveling public given the substandard and dangerous condition of the existing highway

B. OKLAHOMA CITY ABANDONMENT PROCEEDING

On September 23, 2005, BNSF filed a notice of exemption, pursuant to 49 C.F.R. 1152 Subpart F, seeking to abandon the 2.95-mile rail line located between milepost 539.96 and milepost 542.91, in Oklahoma City, OK (the "Line"). Even though the Line is very short, the requested abandonment encompassed three separate and distinct projects. The first was the near-term need to relocate a short segment of BNSF's Chickasha Subdivision located between milepost 540.15 and milepost 541.69 ("Middle Segment"), to accommodate the Highway Project. While BNSF had various relocation options available, it opted to pursue the fastest and least expensive one, which was to rebuild the Packingtown Lead, which essentially parallels the Middle Segment. *See* Exhibit 2.

The second project was the near-term abandonment of the segment of BNSF's Chickasha Subdivision located between milepost 541.69 and milepost 542.91 ("Western Segment") *See* Exhibit 2. One former BNSF customer is located on the Western Segment, Boardman, Inc. ("Boardman"), but Boardman has not shipped by rail since July 2003. While BNSF could have included the Western Segment in the first relocation project, it chose not to in order to

accommodate Oklahoma City's desire to rail-bank the Western Segment. Pursuant to current STB policy, a rail line may only be rail-banked if it is first approved for abandonment. In other words, the right-of-way underlying a rail line that has been relocated will not qualify for rail-banking.

The third project will involve the relocation of the portion of BNSF's Chickasha Subdivision located between milepost 540.15 and milepost 539.96 ("Eastern Segment") in about 18 months. *See Exhibit 2* At the time BNSF filed its notice of exemption, the Eastern Segment was not scheduled to be moved for about four to five years. As part of the Highway Project, an ODOT contractor is currently constructing a new railroad bridge which will elevate BNSF's Red Rock Subdivision where it currently crosses the Chickasha Subdivision and where the new highway will be located. An ODOT contractor will also construct new industry tracks directly from the Red Rock Subdivision to Producers Cooperative Oil Mill ("Producers") and Mid-States Wholesale Lumber ("Mid-States"), two BNSF customers located adjacent to the Eastern Segment. These new industry tracks will connect with the Red Rock Subdivision north of the Chickasha Subdivision and will be privately owned by the two BNSF customers. Once these new industry tracks are in place, BNSF will be able more efficiently to serve these two customers directly from the Red Rock Subdivision without having to access the Chickasha Subdivision. At that time, the old industry tracks located adjacent to the Chickasha Subdivision will become unnecessary and will be removed. After the old industry tracks are removed, the Eastern Segment will no longer be needed to serve local customers and will be relocated slightly to the south to make room for the Highway Project.

In hindsight, BNSF now considers it a strategic mistake to have bundled these three separate projects. At the time the notice of exemption was filed, BNSF considered the three

projects to be minor and non-controversial, since not one of the projects would adversely affect any BNSF customers. Instead, BNSF was of the opinion that the projects, particularly the two relocation projects, would enable BNSF to improve service to its nearby customers, particularly Mid-States. BNSF does not intend to make the same mistake twice and, as explained below, will pursue each of the three projects separately.

BNSF also did not anticipate the vitriolic opposition to the Highway Project from a small group of individuals. Nor did BNSF anticipate that Kessler and his cohorts² would attempt to abuse the Board's OFA procedures to thwart the Highway Project. In *Oklahoma City Abandonment*, the Board invited BNSF to file an individual exemption or an application to abandon the Line. BNSF will be doing so for the Western Segment. As to the Middle Segment and the Eastern Segment, BNSF is seeking a declaratory order from the Board that the relocations of those two line segments do not require either abandonment or construction authority from the Board and that such relocations may not be enjoined by the District Court.

At the time BNSF filed its notice of exemption, BNSF sought to accomplish three objectives in the most expedient and least costly manner: assist ODOT in its Highway Project, preserve rail service to its two customers – Producers and Mid-States – located adjacent to the Highway Project and accommodate Oklahoma City's desire to rail-bank the Western Segment. In bundling the three projects, however, BNSF made one inadvertent but fatal miscalculation. BNSF did not recognize that its previous service to Mid-States and its then-current service to Producers over the Red Rock Subdivision entailed operating over 105 feet (the length of two freight cars) of the Line. BNSF erroneously assumed that the Red Rock Subdivision via the

² In addition to Kessler, Vice-Chair of the Common Cause Oklahoma, parties seeking to obstruct the Highway Project through the Oklahoma City Abandonment Proceeding included Thomas Elmore, of the North American Transportation Institute, an entity whose primary objective seems to be stopping the Highway Project, and Michael Richards of the Bio-Energy Wellness Center.

Shield's Spur connected directly to the turn out to Producers's industrial track. Had BNSF been aware that its trains were actually traversing, rather than merely crossing, the Line in serving Producers, BNSF would have filed a petition for exemption or removed the segment of the Line east of milepost 540.15 from the scope of the notice of exemption. BNSF also did not always adequately refute the allegations made by Kessler and the others in their countless filings in the Oklahoma City Abandonment Proceeding. For example, in *Oklahoma City Abandonment*, the Board noted that BNSF failed adequately to explain how it previously served Mid-States. Attached to Kessler's March 20, 2007, Petition for Ex Parte Emergency Stay is a BNSF letter dated August 22, 2005. As that letter explains, ODOT and Union Pacific Railroad Company ("UP") had entered into an agreement which necessitated the removal of the diamond located on industry track used by BNSF to serve Mid-States. Once that diamond was removed, BNSF no longer had direct access to Mid-States. BNSF and Mid-States agreed to the removal of the diamond on the conditions that ODOT pay BNSF the additional cost of temporarily transloading Mid-States traffic and that ODOT construct a new industry track directly off of BNSF's Red Rock Subdivision north of the Chickasha Subdivision so that BNSF would again have direct access to Mid-States. Contrary to Kessler's insinuations, the diamond was not removed by BNSF or at BNSF's behest.

Prior to the removal of the diamond, BNSF served Mid-States from the Red Rock Subdivision, over the Shields Spur to Mid-States's industrial track. In filing its notice of exemption, BNSF mistakenly thought that the Shields Spur connected to Mid-States's industrial track and that traffic moving to or from Mid-States involved only a crossing of the Line and not, as it turns out, operating over a very short segment of the Line.

II. ARGUMENT.

Under 5 U.S.C. § 554(e), the Board has discretionary authority to issue a declaratory order to terminate a controversy or remove uncertainty. The Board and its predecessor, the Interstate Commerce Commission ("Commission"), have exercised broad authority in handling such requests, considering a number of factors, including the significance of the issue to the industry and ripeness of the controversy. *Delegation of Authority – Declaratory Order Proceedings*, 5 I.C.C.2d 675 (1989). The ability of BNSF to react quickly to relocate two segments of its Chickasha Subdivision without prior Board approval will greatly assist ODOT and promote a major highway project. See *The State of Texas, Department of Transportation – Petition for Declaratory Order Regarding Highway Construction in Tarrant County, TX*, Finance Docket No. 32589 (served Feb. 7, 1995) (Commission instituted declaratory order proceeding to determine, among other things, whether the relocation of a rail line to accommodate a highway project was subject to its jurisdiction); *Union Pacific Railroad Company – Petition for Declaratory Order – Rehabilitation of Missouri-Kansas-Texas Railroad Between Jude and Ogden Junction, TX*, STB Finance Docket No. 33611 (STB served Aug. 21, 1998 ("Rehabilitation of MKT Line").

If the Board declines to rule on this matter and leaves the issues unaddressed, the District Court may interpret such Board action as imposing an obligation on BNSF to file for abandonment authority before the tracks can be relocated. If the District Court rendered such a ruling, BNSF would be forced to return to the Board with one or more new abandonment filings. Given the track record of the prior abandonment proceeding (which took nearly three years to resolve) and the track record of Kessler and the other parties (they have made numerous filings at the Board, in District Court and the Court of Appeals for the District Circuit and have

demonstrated a total disdain for the Board's procedures), such a new filing by BNSF would likely delay the Highway Project and significantly increase the cost of the Highway Project. If, in turn, the Board were to allow Kessler to acquire a segment of the track needed for the Highway Project through the OFA process, the \$557 million Highway Project will come to a halt and hundreds of millions of dollars will have been squandered.³

The Board routinely accepts petitions for declaratory order premised on a court referral. While this petition is not premised on a court referral, there is currently a case pending in the District Court involving the same issues. While BNSF intends to ask the Court to dismiss that pending complaint, if BNSF is unsuccessful, it will seek to have the matter referred to the Board. In these circumstances, BNSF respectfully urges the Board to institute a proceeding at this time and expeditiously resolve the controversies at issue.

Section 402, of the Transportation Act of 1920, 41 Stat. 456, 477 (1920) ("1920 Act"), gave the Commission, for the first time, jurisdiction over the construction of new rail lines and the abandonment of existing rail lines. Shortly after passage of the 1920 Act, however, the Commission recognized that not all construction and abandonment projects fell within its jurisdiction. In *Public Convenience Certificate To P. N. & N. Y. R. R.*, 67 I.C.C. 252 (1921), the applicant proposed to construct a new 1,150-foot long rail line essentially parallel to its existing

³ In the District Court, Kessler repeatedly claims that, in order to relocate the tracks, BNSF must first seek abandonment authority and that when BNSF does so, Kessler will have a statutory right to acquire the segments under the Board's OFA procedures. Kessler, of course, failed to inform the District Court that the purpose of the OFA statute is to preserve rail freight service, not to destroy highway projects.

To the best of BNSF's knowledge, no local shippers have been served from the Middle Segment for more than 10 years. Once the new industry tracks to Mid-States and Producers are constructed and the old ones removed, there will no longer be any shippers located on the Eastern Segment. Consequently, Kessler will be unable to provide any rail freight service on either segment. That, however, will not deter Kessler from filing an OFA since his objective is to disrupt and possibly cripple the Highway Project and not to provide rail freight service.

line in Philadelphia, PA. Once the new line was constructed, the applicant intended to abandon its existing line to accommodate the widening of a street. Because rail service was unaffected by the project, the Commission found that the project constituted neither an abandonment nor construction within the meaning of the 1920 Act. In finding that it had no jurisdiction over the project, the Commission noted that:

The project is purely a relocation of an existing line under circumstances involving no change in the service rendered by the applicant to the public

Id. at 253

Subsequently, in *Missouri Pac. R. Co. Trustee Construction*, 282 I.C.C. 388 (1952) ("MoPac"), the Commission was confronted with a proposal to relocate a rail line in the City of St. Louis to make room for a highway construction project. In determining whether it had jurisdiction over the relocation project, the Commission adopted a five part test:

We have in the past assumed jurisdiction in those cases of railroad relocation whenever the proposed change concerned service to shippers; the development of new territory or traffic, established more competition or otherwise changed existing competitive situations; affected, more than ordinarily, a carrier's revenues or operating expenses, or was related to the matter of rail transportation generally.

Id. at 391.

The Commission found that it lacked jurisdiction over the project because the new line operated in the same manner as the existing one, no shippers were involved and no new competitive territory was reached.

In 1980, the Commission exempted six types of transactions from the provisions of former 49 U.S.C. §§ 11344 and 11346, including relocation projects involving two or more railroads that do not disrupt service to shippers. See *Railroad Consolidation Procedures*, 363 I.C.C. 200 (1980); 49 C.F.R. § 1180.2(d)(5). The Commission explained the rationale behind the

adoption of the joint relocation exemption in *Southern P. Transp. Co. & S.S.W. Ry. Co. – Exemption*, 363 I.C.C. 848, 850 (1981):

The relocation of railroad operations frequently does not affect matters with which the Commission has a regulatory interest (such as service to shippers or intramodal competition). A railroad's decision to relocate certain operations may merely reflect practical considerations (such as exist in this proceeding). The Commission has long recognized that, although these "relocations" would ordinarily come within the purview of our jurisdiction, Congress never intended that we should review and give prior approval to relocation transactions. Therefore, even prior to Congress' adoption of exemption authority in 49 U.S.C. § 10505, we have, in appropriate circumstances, entertained petitions for dismissal of applications related to relocations

In *City of Detroit v. Canadian National Ry. Co., et al*, 9 I.C.C.2d 1208 (1993), *aff'd sub nom. Detroit/Wayne County Port Authority v. ICC*, 59 F.3d 1314 (D.C. Cir. 1995) ("City of Detroit"), the Commission determined that it lacked jurisdiction over the construction of a new railroad tunnel located adjacent to the existing tunnel. The Commission reviewed the language of the statute and Justice Brandeis' opinion in *Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co.*, 270 U.S. 266 (1925) ("Texas & Pacific") and altered the five part test established in *MoPac*:

We believe that the only proper test for jurisdiction in a relocation case is to consider the words of the statute, as construed by the Supreme Court in *Texas & Pacific*.

City of Detroit at 1218 ⁴

In finding that it lacked jurisdiction over the relocation, notwithstanding the competition arguments raised by opponents of the new tunnel, the Commission noted that:

⁴ In at least one subsequent case, however, it appears that the Board utilized the *MoPac* test in determining whether it had jurisdiction over a relocation project. See *Sacramento Regional Transit District – Petition for Declaratory Order Regarding Carrier Status*, STB Finance Docket No. 33796 (STB served July 5, 2000) ("*Sacramento*"). In *Sacramento*, the Board applied a four part test, including the *MoPac* effect on competition test, in determining that the relocation of a UP line to accommodate commuter passenger operations did not require approval by the Board.

Where the physical relocation of a line does not involve the extension into or invasion of new territory, we do not believe that any further inquiry into the effect on competition is required or appropriate in determining jurisdiction.

Id. at 1219.

Finally, in joint relocation projects, the Commission and the Board have repeatedly found that the project qualifies for the class exemption if the removal of the existing track does not affect service to shippers and the construction of the new track does not involve expansion into new territory. *See e.g., Central Railroad Company of Indiana – Joint Relocation Projects Exemption – CSX Transportation, Inc.*, STB Docket No. 34187 (STB served April 19, 2002); *Flats Industrial Railroad Company and Norfolk Southern Railway Company – Joint Line Relocation Project Exemption – in Cleveland, OH*, STB Docket No. 34108 (STB served Nov. 15, 2001); *Saginaw Valley Railway Company – Joint Relocation Project Exemption – Huron and Eastern Railway Company*, STB Finance Docket No. 34089 (STB served Sept. 11, 2001).

As is demonstrated below, the relocations of the Middle Segment and the Eastern Segment are not subject to the Board's jurisdiction under any of the tests or standards applied by the Commission and the Board over the years.

A. THE FIRST RELOCATION PROJECT

As previously noted, the first relocation project involved the rebuilding of the Packingtown Lead and will involve the subsequent removal of the tracks on the Middle Segment. To the best of BNSF's knowledge, the Middle Segment has not been used to serve local customers for at least ten years. To accommodate the Highway Project, the Middle Segment needed to be moved slightly to the south. *See Exhibit 3.* In reviewing its options, BNSF determined that the fastest and least expensive option was to rebuild the Packingtown Lead rather than building another parallel line between the Chickasha Subdivision and the

Packingtown Lead. In order to reroute the overhead traffic over the Packingtown Lead, that corridor needed to be reconstructed. The rebuilding project included the construction of a turnout at the western end to reconnect the Chickasha Subdivision, at milepost 542.91, to the Packingtown Lead, replacing all of the rail and ties on the Packingtown Lead, constructing all new crossings, gates and flashers along the corridor, and constructing a new wye connection to the Red Rock Subdivision on the east end. In other words, a totally new rail line was constructed in the right-of-way of the old Packingtown Lead with the same throughput capacity and operating speeds as the Chickasha Subdivision line. See Exhibit 3.

The relocation of the Middle Segment onto the right-of-way of the Packingtown Lead clearly is not subject to the Board's jurisdiction under the standard adopted in *City of Detroit* and the one used in the joint relocation proceedings. The physical relocation of the Middle Segment does not involve an extension into or invasion of new territory, since the Packingtown Lead, at the time it was rebuilt, was an existing BNSF rail corridor. In addition, the removal of the Middle Segment does not affect service to shippers since there are no shippers located on the Middle Segment.

The relocation of the Middle Segment also meets the five part test adopted in *MoPac*: the removal of the Middle Segment does not concern service to shippers since that track was used only for overhead movements and those movements have already been rerouted over the rebuilt Packingtown Lead; the reconstruction of the Packingtown Lead did not develop new territory or traffic for BNSF in that BNSF already owned that corridor; the reconstruction of the Packingtown Lead also did not establish more competition or otherwise change existing competitive situations because use of the Packingtown Lead, as opposed to use of the Middle Segment, did not enable BNSF to divert any rail traffic being handled by another railroad; the

relocation of the Middle Segment did not materially affect BNSF's revenues or operating expenses; and the relocation was not related to the matter of rail transportation generally, but was undertaken to accommodate a major highway project.

The reconstruction of the Packingtown Lead and removal of the tracks on the Middle Segment are not subject to the Board's jurisdiction for alternative reasons. The reconstruction of the Packingtown Lead is not subject to the Board's jurisdiction because that reconstructed line does not penetrate or invade a new market. *See Texas & Pacific; Nicholson v. Missouri Pacific Railroad Company*, 366 I.C.C. 69, 72 (1982), *aff'd sub nom., Nicholson v. ICC*, 711 F.2d 364 (D.C. Cir. 1983), *cert denied*, 464 U.S. 1056 (1984). The reconstructed Packingtown Lead is being used to handle overhead traffic formerly traversing the Middle Segment.⁵ *See Rehabilitation of MKT Line* (the rehabilitation and reactivation of a former MKT line located adjacent to a UP line was found not subject to the Board's jurisdiction).⁶ The reconstruction of the Packingtown Lead can be viewed as a double-tracking of the Chickasha Subdivision between milepost 542.91, on the west end, and milepost 540.15, on the east end, and, as such, is not subject to the jurisdiction of the Board. *See Rehabilitation of the MKT Line; City of Detroit* at 1219 ("Double-tracking is an improvement to an existing rail line. It is neither an extension of the line nor a construction of an additional one").

Once the Packingtown Lead was reconstructed, the removal of any portion of the Chickasha Subdivision between milepost 542.91 and milepost 540.15 was no longer subject to

⁵ The reconstructed Packingtown Lead also preserves rail service to a Cargill, Inc., facility located adjacent to the Packingtown Lead 370 feet from the Red Rock Subdivision.

⁶ The MKT line runs essentially parallel to the UP line, in one place the two lines are only 100 feet apart, in another area the lines are 1.75 miles apart. The reconstructed Packingtown Lead similarly runs parallel to the Middle Segment. On the west end the Packingtown Lead connects with the Chickasha Subdivision and on the east end the Packingtown Lead is located .8 miles from the Chickasha Subdivision.

the Board's jurisdiction. The Commission and the Board have consistently held that the removal of one track on a double or multiple-tracked railroad line is beyond the jurisdiction of the Board, so long as at least one track remains. See *Chicago, M., St P. & P. R. Co Trackage Rights*, 312 I.C.C. 75, 76 (1960)(“Chicago Trackage Rights”); *Boston & Albany R. Abandonment*, 312 I.C.C. 458, 461 (1961)(“Boston & Albany”); *Missouri-K.-T. R. Co. Abandonment*, Finance Docket No. 21180 (ICC decided Nov. 1, 1960).

In *Chicago Trackage Rights*, the Commission explained why it did not have jurisdiction over the removal of a second, parallel track:

[T]he applicant's line of railroad under consideration consists of double main tracks. If the applicant intended to abandon both the eastbound and westbound tracks between Jackson and Clark Streets there would be little doubt but that our permission therefore would be required under the provisions of section 1(18) of the act, since an entire line of railroad between those two points would be retired. However, the abandonment of the eastbound track only, as proposed, will still leave the applicant with a line of railroad between the points involved. For this reason, and for the further reason that there will be no change in the present train service, the proposed retirement of the eastbound track does not constitute an abandonment of a line of railroad as contemplated by section 1(18) and, therefore, such retirement is not within our jurisdiction

Chicago Trackage Rights at 76. In *Boston & Albany*, the Commission determined that it did not have jurisdiction over the removal of two of four multiple main line tracks

As these cases demonstrate, the Board does not have jurisdiction over every railroad construction project or every rail line abandonment even though the tracks involved are not excepted tracks under 49 U.S.C. § 10906.

B. THE SECOND RELOCATION PROJECT

The second relocation project will take place in about 18 months after the north-south running Red Rock Subdivision has been elevated over the east-west running Chickasha Subdivision and new industry tracks allow BNSF to access Producers and Mid-States directly

from the Red Rock Subdivision. As previously noted, an ODOT contractor is currently constructing a new railroad bridge which will elevate the Red Rock Subdivision over the portion of the Chickasha Subdivision where the new highway will be located. Once the rail bridge and new industry track construction are completed, a new connection to the industry tracks will be installed directly from the Red Rock Subdivision to serve the facilities of Producers and Mid-States. Once that project is completed, the connections currently used to serve Producers and formerly used to serve Mid-States will be removed.⁷

Upon the completion of these tasks by ODOT, BNSF will begin serving both Producers and Mid-States directly from the Red Rock Subdivision without having to access the Chickasha Subdivision. At that time, the portion of the Chickasha Subdivision located to the east of milepost 540.15 will be used solely for the movement of overhead traffic to and from BNSF's North yard located to the east of the Eastern Segment. The Eastern Segment will no longer be needed or used to serve local customers. To accommodate the Highway Project, BNSF will, at that time, relocate the Eastern Segment to the south (with a variance of 30 to 400 feet) to allow for the realignment of the Chickasha/Red Rock connection. The relocated line will continue to be used solely to handle overhead traffic.

As soon as BNSF begins serving Producers and Mid-States directly from the Red Rock Subdivision, the relocation of the Eastern Segment will not be subject to the jurisdiction of the Board. The physical relocation of the Eastern Segment will not involve an extension into or invasion of new territory since BNSF will not be able to serve any new customers from the relocated line and the relocated line will lie merely a few feet south of its current location. In addition, the removal of the Eastern Segment from its current location will not affect service to

⁷ The construction of the new industry tracks and removal of the existing industry tracks are not subject to the jurisdiction of the Board. 49 U.S.C. § 10906.

shippers, since the two shippers located adjacent to the Eastern Segment will be served directly from the Red Rock Subdivision. Consequently, the relocation of this line is not subject to the Board's jurisdiction under the standard adopted in *City of Detroit* and the one used in joint relocation proceedings.

As with the Middle Segment, the relocation of the Eastern Segment meets the five part test adopted in *MoPac*: the removal of the Eastern Segment will not concern service to shippers since BNSF will already be serving the only two shippers located along Eastern Segment directly from the Red Rock Subdivision; the construction of the new line will not develop new territory or traffic because the new line will be located immediately adjacent to the existing line and BNSF will not be able to access any new customers from the new line; the construction of the new line will also not establish more competition or otherwise change existing competitive situations because use of the new line will not enable BNSF to divert any rail traffic currently handled by another railroad; the relocation of the Eastern Segment will not materially affect BNSF's revenues or operating expenses; and the relocation will not be related to the matter of rail transportation generally, but will accommodate a major highway project.

III. EXPEDITED CONSIDERATION REQUESTED.

BNSF respectfully requests expedited processing of this proceeding. While the reconstruction of the Packingtown Lead is completed and the traffic formerly moving over the Middle Segment is moving over the Packingtown Lead, the removal of the Middle Segment, which is necessary for the Highway Project to move forward, has not been completed in light of *Oklahoma City Abandonment*. In about 18 months, BNSF will need to expeditiously relocate the Eastern Segment. Any substantial delays in the removal of the BNSF tracks located on the corridor to be used for the Highway Project will cause construction delays and will likely result

in millions of dollars of cost overruns. Expedited processing of this proceeding will limit such wasteful and unnecessary spending by ODOT. The issues raised in this petition are fairly straightforward and the applicable law is well-developed and settled. Consequently, BNSF urges the Board to establish an expedited schedule for the filing of replies and the processing of this proceeding. There is no need in this proceeding for the repetitive and abusive filings made by Kessler and his cohorts in the Oklahoma City Abandonment Proceeding. Alternatively, the Board can issue a declaratory order without first seeking public comments.

IV. CONCLUSION

For all of the foregoing reasons, BNSF respectfully requests that the Board issue an order declaring that: (1) the relocation of the Middle Segment was a project not subject to the Board's jurisdiction and that BNSF may continue to remove the remainder of the tracks on the Middle Segment; and (2) the relocation of the Eastern Segment, once BNSF begins serving the two customers directly from the Red Rock Subdivision over the new industry tracks, will not be subject to the Board's jurisdiction. In so doing, the Board should also make clear that neither project may be enjoined by the District Court on grounds that the projects require prior Board approval.

The Board is the last Federal, state or local agency to stand in the way of the Highway Project. Kessler and his cohorts appear to have exhausted all other means of stopping the Highway Project. From newspaper accounts and documents on the Internet it appears that these individuals have sought unsuccessfully to have the Oklahoma Governor, other elected officials and various Federal, state and local entities intervene on their behalf and stop the Highway

Project ⁸ The Board should not allow its good offices to be abused by a small group of zealots who believe they know how to improve the highway infrastructure in Oklahoma City better than the Oklahoma Governor, ODOT, FHA, FRA, Oklahoma City, as well as the numerous other Federal and state entities that have reviewed the Highway Project. In their to date unsuccessful attempts to remake the Oklahoma City transportation infrastructure to their liking, these individuals have demonstrated disdain for the Board's procedures and a total disregard for the safety of the traveling public and the wasteful spending of taxpayer dollars caused by their delay tactics.

Respectfully submitted,

A handwritten signature in cursive script, reading "Kristy Clark", is written over a horizontal line.

David Rankin
Kristy Clark
BNSF RAILWAY COMPANY
2500 Lou Menk Drive
Fort Worth, TX 76131-2828

Dated: July 14, 2008

⁸ For example, at the announcement of FHA's approval of the Highway Project, Mr. Elmore orchestrated a demonstration against the Project.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition has been served on the following entities by first class mail this 14th day of July, 2008:

Fritz Kahn
8th Floor
1920 N Street, N.W.
Washington, DC 20036-1601

Edwin Kessler
1510 Rosemont Drive
Norman, Oklahoma 73072

A handwritten signature in black ink, reading "Kristy Clark", is written over a horizontal line.

EXHIBIT 1

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

(1) EDWIN KESSLER,)	
)	
Plaintiff)	
)	
-vs-)	NO CIV-2008-358-R
)	
(1) BNSF RAILWAY COMPANY, and)	
)	
(2) STATE OF OKLAHOMA, ex rel.)	
OKLAHOMA DEPARTMENT OF)	
TRANSPORTATION, Secretary of)	
Transportation (3) Phil Tomlinson and)	
Director (4) Gary Ridley, in their official)	
capacity,)	
)	
Defendants)	

**FIRST AMENDED
COMPLAINT FOR INJUNCTIVE RELIEF**

I Edwin Kessler ("Kessler"), Plaintiff in the above captioned matter, comes before the Court pursuant to Rules 3 and 65 of the Federal Rules of Civil Procedure, and files this First Amended Complaint for Preliminary and Permanent Injunctive Relief, asking this Court to enjoin Defendants, their officers, agents, servants, employees, attorneys, contractors, and all persons acting in active concert or participation with them, pending a determination of the merits of this Complaint, from actions which violate a June 5, 2008 decision of the Surface Transportation Board ("Board" or "STB"), in *BNSF Railway Company – Abandonment Exemption – In Oklahoma County, OK*, STB Docket No AB-6 (Sub-No 430-

X) ("Line") (See attached Exhibit 1)

2 The STB decision vacated a prior grant of exemption to abandonment of a section of the BNSF Chickasha Subdivision (former Frisco) Line (also "The Line") which was the subject of proceedings before the Board. BNSF sought abandonment of the former Frisco Line and its removal from the National Railway system in furtherance of an agreement with Defendant Oklahoma Department of Transportation ("ODOT") as represented by the individual Defendant officials herein. The intention was to remove the subject Line in favor of an ODOT road project

3 The ODOT road project also requires destruction of the rail yard at Union Station as well as several significant permanent functional, as well as historical rail overpasses and other adjacent facilities associated with the subject Line, and which would permanently and irrevocably alter the ability to use the Chickasha Subdivision (former Frisco) Line, rail overpasses, Union Station, and accompanying tracks and structures for rail freight and/or passenger service.

4 The Defendants have disabled the subject Line by cutting both sides of the segment proposed to be abandoned. There is continued and ongoing danger of injury and damage to the subject Line and its attendant facilities. Rail lines in Union Station have been ripped up, the line has been cut on both ends, switches have been removed, a million dollar signal has been built on the west end of the subject line that impedes the flow of any rail traffic onto the line from that direction, road construction all along and adjacent to the subject Line continues despite its status as a portion of the National railway system

5. Despite the June 5, 2008 decision of the STB, upon information and belief, Kessler asserts that additional destruction of the subject Line and accompanying structures which are referenced herein, continues and/or is contemplated in furtherance of the ODOT road project, which actions would cause significant and irreparable harm to the Line that can only be prevented by the issuance of a preliminary and permanent injunction

6 The STB has continuing jurisdiction over the national railroad system, including the subject Line, until an abandonment is consummated. Because of the ongoing nature of the road project and significant existing construction already undertaken which will use the right of way of the Chickasha subdivision Line, it is clearly inevitable that BNSF and users of the Line will again be required to seek abandonment of the subject Line in favor of the existing road project

7 When an abandonment is proposed, federal law permits any person to propose retention of the line as a part of the National Railway System by the use of an Offer of Assistance (OFA) which allows the OFA Applicant to purchase the line at agreed values or if no agreement can be made, then the value is set by the STB. Kessler previously submitted an OFA involving the subject Line and will submit a second OFA in the inevitable subsequent abandonment proceeding and therefore has a significant interest to be protected by this action seeking to prevent the imminent destruction of the subject Line. OFA's can also include not only the railway, the land, but "all facilities on the line or portion necessary to provide effective transportation services." Railroads are required to "maintain the status quo with respect to its property interests in the rail line as described in its abandonment

petition” *Railroad Ventures, Inc. v. Surface Transp. Bd.*, 299 F.3d 523, 552 (6th Cir. 2002) (“*Railroad Ventures*”)

8 Plaintiff Kessler seeks the protection of this Court in the maintenance of the status quo of the Chickasha subdivision (former Frisco line) pending the new filing of the abandonment proceeding or a new exemption (unlikely given the continued use of a portion of the line) and the inevitable consideration of Kessler’s OFA by the STB

In support of this Complaint, Kessler states

I. PARTIES

9 Kessler is a citizen of the State of Oklahoma, and is a “person” as that term is used in 49 U.S.C. §11704(a). In the previous abandonment proceeding brought before the STB, Kessler filed, pursuant to 49 U.S.C. §10904(c), a Notice of Intent to File an Offer of Financial Assistance (“OFA”) to purchase the subject Line and intends to file an OFA with the STB in any new abandonment proceeding for the subject Line

10 BNSF Railway Company (“BNSF”) is a “rail carrier providing transportation subject to the jurisdiction of the Board,” as that phrase is used in 49 U.S.C. §11704(a). On September 23, 2005, BNSF filed a Notice of Exemption to abandon the subject Line (“previous abandonment”)

11 STATE OF OKLAHOMA, *ex rel.* Oklahoma Department of Transportation is an agency of the State of Oklahoma. This action is also brought against Phil Tomlinson, as Secretary of Transportation, and Gary Ridley, as Director, in their official capacity for

purposes of prospective injunctive relief. These Defendants will be collectively referred to as "ODOT." Upon information and belief, Plaintiff alleges that ODOT has an agreement with BNSF to purchase the right of way of the subject Chickasha Subdivision Line for its use in an ODOT Road project. As a part of that agreement to purchase the underlying right of way and Line and the ongoing ODOT road project, it is inevitable that BNSF and the other users of the Railway must file an Application for Abandonment of the Line in favor of the sale to ODOT. On information and belief, Kessler believes ODOT is an "agent" of BNSF, and is a "person," as those terms are used in 49 U.S.C. §11901(a) and (c), respectively. On information and belief, ODOT and/or BNSF has contracted, and/or will contract with various contractors to salvage the subject Line, and/or to alter the physical characteristics of the subject Line and/or underlying right-of-way by removal of the Line in such a way as to permanently alter the ability to use the subject Line and right of way as a part of the National Railway system and to remove the Line and right of way from the jurisdiction of the STB.

II. JURISDICTION AND VENUE

12 Jurisdiction in this U.S. District Court is pursuant to 28 U.S.C. §1331 (General federal question jurisdiction), 28 U.S.C. §1336 (Jurisdiction regarding Orders of the STB); and 49 U.S.C. §11704 (a).

13 Venue in this U.S. District Court is pursuant to 49 U.S.C. §11704(d)(1)(A) [this is the judicial district in which the Plaintiff resides] and (C) [this is the judicial district through which the railroad line of BNSF runs]. ODOT can be served in Oklahoma.

III. STATUTES INVOLVED

14 **49 U.S.C. § 11704. Rights and remedies of persons injured by rail carriers.**

(a) A person injured because a rail carrier providing transportation or service subject to the jurisdiction of the Board under this part¹ does not obey an order of the board, except an order for the payment of money, may bring a civil action in a United States District Court to enforce that order under this subsection

(b) A rail carrier providing transportation subject to the jurisdiction of the Board under this part is liable for damages sustained by a person as a result of an act or omission of that carrier in violation of this part

(c)(1) A person may file a complaint with the board under section 11701(b) of this title or bring a civil action under subsection (b) of this section to enforce liability against a rail carrier providing transportation subject to the jurisdiction of the Board under this part

- - - - -

(d)(1) When a person begins a civil action under subsection (b) of this section to enforce an order of the Board requiring the payment of damages by a rail carrier providing transportation subject to the jurisdiction of the Board under this part, the text of the order of the Board must be included in the complaint. In addition to the district courts of the United States, a State court of general jurisdiction having jurisdiction of the parties has jurisdiction to enforce an order under this paragraph. The findings and order of the Board are competent evidence of the facts stated in them. Trial in a civil action brought in a district court of the United States under this paragraph is in the judicial district

- -

- (A) in which the plaintiff resides,
- (B) in which the principal operating office of the rail carrier is located, or
- (C) through which the railroad line of that carrier runs

¹ Part IV of the Interstate Commerce Commission Termination Act as codified in 49 U.S.C. §§701-727 (general provisions) and §§10101-11908 (rail provisions)

(3) The district court shall award a reasonable attorney's fee as a part of the damages for which a rail carrier is found liable under this subsection. The district court shall tax and collect that fee as a part of the costs of the action.

15 **49 U.S.C. § 11901. General civil penalties.**

(a) Except as otherwise provided in this section, a rail carrier providing transportation subject to the jurisdiction of the board under this part, an officer or agent of that rail carrier, or a receiver, trustee, lessee, or agent of one of them, knowingly violating this part or an order of the Board under this part is liable to the United States Government for a civil penalty of not more than \$5,000 for each violation. Liability under this subsection is incurred for each distinct violation. A separate violation occurs for each day the violation continues.

(c) A person knowingly authorizing, consenting to, or permitting a violation of sections 10901 through 10906 of this title or of a requirement or a regulation under any of those sections, is liable to the United States Government for a civil penalty of not more than \$5,000.

(f) Trial in a civil action under subsections (a) through (c) of this section is in the judicial district in which the rail carrier has its principal operating office or in a district through which the railroad of the rail carrier runs.

16 **49 U.S.C. §10903. Filing and procedure for application to abandon or
discontinue.**

(a) (1) A rail carrier providing transportation subject to the jurisdiction of the board under this part who intends to –

(A) abandon any part of its railroad lines, or

(B) discontinue the operation of all rail transportation over any part of its railroad lines, must file an application relating thereto with the Board. An abandonment or discontinuance may be carried out only as authorized under this chapter.

(d) A rail carrier providing transportation subject to the jurisdiction of the Board under this part may –

(1) abandon any part of its railroad lines, or

(2) discontinue the operation of all rail transportation over any part of its railroad lines,

only if the Board finds that the present or future public convenience and necessity require or permit the abandonment or discontinuance. In making the finding, the Board shall consider whether the abandonment or discontinuance will have a serious, adverse impact on rural and community development.

17 **49 U.S.C. §10904. Offers of financial assistance to avoid abandonment and discontinuance.**

(c) Within 4 months after an application is filed under section 10903, any person may offer to subsidize or purchase the railroad line that is the subject of such application. Such offer shall be filed concurrently with the Board. If the offer to subsidize or purchase is less than the carrier's estimate stated pursuant to subsection (b)(1), the offer shall explain the basis of the disparity, and the manner in which the offer is calculated.

(d) (2) If the Board finds that such an offer or offers of financial assistance has been made within such period, abandonment or discontinuance shall be postponed until –

(A) the carrier and a financially responsible person have reached agreement on a transaction for subsidy or sale of the line, or

(B) the conditions and amount of compensation are established under subsection (f)

- (e) Except as provided in subsection (f)(3), if the rail carrier and a financially responsible person fail to agree on the amount or terms of the subsidy or purchase, either party may, within 30 days after the offer is made, request that the Board establish the conditions and amount of compensation
 - (f) (1) Whenever the Board is requested to establish the conditions and amount of compensation under this section –
 - (A) the Board shall render its decision within 30 days,
 - (B) for proposed sales, the Board shall determine the price and other terms of sale, except that in no case shall the Board set a price which is below the fair market value of the line (including, unless otherwise mutually agreed, all facilities on the line or portion necessary to provide effective transportation services),
-
- (2) The decision of the board shall be binding on both parties . .

IV. FACTS COMMON TO ALL CLAIMS

A. BACKGROUND INFORMATION

18 All the factual allegations contained in the preceding paragraphs are incorporated herein as if they were set out in full.

19. On September 23, 2005, BNSF and Stillwater Central Railroad, Inc (“SLWC”) jointly filed with the Surface Transportation Board (“Board”) a notice of exemption (“NOE”) under 49 CFR 1152 Subpart F – *Exempt Abandonments and Discontinuances of Service*, for BNSF to abandon, and for SLWC to discontinue service

over, approximately 2.95 miles of railroad between milepost 539.96 [a few hundred feet west of where the Line crosses the Oklahoma River (formerly North Canadian River), and which is about 1,500 feet east of where the Line passes under Shields Ave], and milepost 542.91, which is about 500 feet west of where the Line crosses South Agnew Street

20 BNSF's NOE to abandon the Line automatically became effective on November 12, 2005. However, per the Board's rules, BNSF could not begin consummation of its abandonment of the Line until SLWC received authority to discontinue service over the Line.

21. In a Decision on January 26, 2007, the Board granted SLWC authority to discontinue service over the Line. Consequently, beginning on January 26, 2007, BNSF had Board authority to abandon (salvage) the Line.

22. In its NOE, BNSF certified "that no local traffic has moved over the line for at least 2 years." See 49 CFR 1152.50 (a)(2).

23. The last sentence of 49 CFR 1152.50 (d)(3) states.

"If the notice of exemption contains false or misleading information, the use of the exemption is void *ab initio* and the Board shall summarily reject the exemption notice."

to the Producer's Co-Op, which has a spur that comes off the Line at MP 540.13.

24. On February 13, 2007, Kessler filed a formal "Notice of Intent to File an Offer of Financial Assistance ("OFA") to purchase the Line.

25. On February 27, 2007, Tom Elmore photographed a BNSF train crew using the portion of the Line that lies between MP 539.96 and MP 540.40, to provide local rail service.

26 On February 27, 2007, the Board rejected Kessler's OFA, stating the deadline for filing the OFA expired on November 12, 2005, which was 10 days after BNSF's NOE was published in the Federal Register

27 On February 21, 2007, Kessler filed a Petition to Reopen with the Board, asking the Board to reopen, then reconsider its decision granting BNSF authority to abandon the Line based upon significant evidence that the BNSF Petition contained false and misleading information

28 Kessler argued before the Board that BNSF's continued use of the Line to provide local rail service to the Producer's Co-Op, contravened BNSF's certification "that no local traffic has moved over the line for at least 2 years," and contravened BNSF's certification that the Line has not been needed, or used, to provide local rail service, since September, 2003 [The only rail access to the Producer's Co-Op rail spur, is from the Line at MP 540 13 The Producer's Co-Op has continued to receive rail service several times a week from September, 2003 through the current date]

29 In a Decision served on February 7, 2008, the Board's Chairman Nottingham found Kessler's new evidence [photographic evidence that the Line was used for local freight service on February 27, 2007, or two years after BNSF's NOE was filed, and BNSF correspondence indicating local shippers had been served via the Line within the two year period prior to BNSF filing its NOE], warranted issuing a Decision Ordering BNSF not to consummate abandonment of the Line until after the Board ruled on Kessler's Petition to Reopen (February 7, 2008 Decision at p. 2).

30. After subsequent proceedings, on June 5, 2008 the STB rendered a decision in Kessler's favor as to his Petition to Reopen. A copy of the STB decision is attached hereto as Exhibit 1. Based upon the STB's determination that BNSF's NOE contained "false or misleading statements," ["no local traffic has moved over the line for at least 2 years"], the Board, per 49 CFR 1152.50 (d)(3), determined that a reopening of the proceeding was warranted on the basis of the new evidence introduced by Kessler.

31. After reopening, the STB determined that BNSF's own submissions indicated that BNSF provided "false and misleading" statements to the STB. Based upon 49 C.F.R. 1152.50(d)(3) the STB concluded

In sum, the new evidence before the Board—including the evidence submitted by BNSF itself—shows that BNSF moved local traffic over the Line for one or more shippers during the September 2003 to September 2005 time period. This means that its certification in September 2005 was false or misleading. As a result, we will reopen the January 2007 decision and reject BNSF's notice of exemption as void ab initio.

Ex. 1 - STB June 5, 2008 Order, p. 7.

32. The Board did not foreclose BNSF "from filing a properly supported petition for an individual exemption or an application to abandon the Line under a new docket number." Kessler alleges that given the contractual obligations between and among the Defendants, the ongoing ODOT road project, and the previous abandonment proceeding, it is inevitable that BNSF will file another abandonment proceeding of some nature. Such a proceeding will offer an opportunity for Kessler to submit a new OIA.

33. Upon information and belief, Plaintiff believes that BNSF is contractually

obligated to ODOT to remove the Chickasha Subdivision (former Frisco) Line from the National Railway System and turn it over to ODOT for the road project. The road project is currently under construction and the planned configuration is that the road project will cross the Chickasha Subdivision and will infringe its right of way. This cannot be done except by a new proceeding in abandonment or a request for an individual exemption by BNSF and demonstrates the inevitability of a new abandonment proceeding.

B. BNSF'S APPARENT CONTINUING DISREGARD FOR THE BOARD'S FEBRUARY 7, 2008 ORDER AND NOW THE JUNE 5, 2008 FINAL ORDER.

34. All the factual allegations contained in the preceding paragraphs are incorporated herein as if they were set out in full.

35. On February 14, 2008, Tom Elmore observed, spoke with, and photographed a salvage crew cutting and salvaging a portion of the Line just west of where the Line passes under Shields Blvd. The salvage crew and the owner of the company they work for, stated that they were salvaging the Line pursuant to a salvage contract. See Exhibit 2, February 17, 2008 Verified Statement of Thomas Elmore and also Separate Affidavit of Thomas Elmore)

36. On February 26, 2008, Tom Elmore observed and photographed a steel pole, part of a cantilevered railway crossing signal, that had been erected in the middle of the tracks where the Line crosses Agnew Ave, which signal was erected on February 22, 2008. See Exhibit 3, March 5, 2008 Verified Statement of Thomas Elmore.

37. Sometime between February 26, 2008 and March 17, 2008, upon information and belief, Plaintiff alleges that the switch that connected the Line to the Shields Spur at MP 540 15, and about 100 feet of the Line immediately west of this switch, was unlawfully removed by BNSF or its agents. See Exhibit 4, March 20, 2008 Verified Statement of Thomas Elmore.

38. On February 19, 2008, Susan L. Odom, Manager, BNSF Network Strategy, made a verified statement that BNSF had not issued a salvage contract to salvage the Line.

39. Since the work crew, and the owner of the company employing the work crew, that was salvaging the Line on February 14, 2008, both stated that they were salvaging the Line pursuant to a salvage contract, and since Susan Odom, BNSF's Network Strategy Manager, testified that BNSF had not let a salvage contract for the Line, it would also be a reasonable inference that ODOT or their agent let the salvage contract. However, Kessler has been unable to serve discovery on ODOT, since ODOT is not a party to BNSF's abandonment proceeding and formal court discovery has not commenced in this action.

40. Other work in destruction has continued on the previously abandoned line. While some of this is an alteration of the line for its use as a "shoo fly" (detour) for an adjacent Union Pacific Line while the original Union Pacific Line is moved north, it is anticipated that the Chickasha Subdivision, former Frisco Line, will be permanently removed after the move of the Union Pacific line is complete.

41. ODOT and BNSF have significantly altered or intend to alter certain adjacent railroad structures to the Chickasha Subdivision including siding tracks at Union Station, two

constructed concrete train overpasses, and other significant structures which are “facilities on the line or portion necessary to provide effective transportation services”

C. ODOT’S UNRECALCITRANT BEHAVIOR, REFUSAL TO RECOGNIZE THE JURISDICTION OF THE STB AND ITS CLAIM THAT IT IS NOT SUBJECT TO THE JURISDICTION OF THE STB DESPITE ITS OWNERSHIP OF SIGNIFICANT RAILROAD LINES IN OKLAHOMA.

42. All the factual allegations contained in the preceding paragraphs are incorporated herein as if they were set out in full

43. Despite the voidance of the BNSF Abandonment Exemption, ODOT continues its road project unabated through an area which is part of the right of way of the Chickasha Subdivision (former FISCO) Line, thereby permanently altering and damaging the property and “ . facilities on the line or portion necessary to provide effective transportation services ”

44. Despite the inevitability and necessity of another abandonment proceeding in order to use the subject Line in its road project and without regard to any consideration that Railroads are to “maintain the status quo with respect to its property interests in the rail line as described in its abandonment petition” ODOT is infringing and damaging the continued ability to use the subject line and its facilities as part of a railway system even though there has been no determination of the STB concerning any abandonment being in the public interest, convenience, and necessity.

45. ODOT has alleged in previous filings before this Court that it is not subject to

the jurisdiction of the STB even though it is the owner of hundreds of miles of railroad tracks in the State of Oklahoma and upon information and belief, Plaintiff states that ODOT owned rail tracks which cross state lines out of the State of Oklahoma. Under federal law, ODOT, as owner, has primary responsibility to provide service across those lines even if the lines are operated by others and ODOT is subject to the jurisdiction of the STB as owner. Despite STB jurisdiction, ODOT's statements denying being subject to STB jurisdiction, its refusal to recognize the interest of the subject line as part of the national railway system, its actions in destruction of the facilities attendant to the subject line, and its joint participation and encouragement of BNSF in the removal or rendering of the subject line as unusable as a railroad necessitates prospective injunctive authority against the individual ODOT defendants to protect the federal interests involved and the individual interest of Plaintiff Kessler.

46 Even though no new abandonment proceeding has been instituted, its inevitability is mandated by the June 5, 2008 decision of the STB and is anticipatory, in much the same way that anticipatory breach can state a cause of action, and thus related to the enforcement of the STB decision and the federal interests involved.

V. FEDERAL CASE LAW

47. All the factual allegations contained in the preceding paragraphs are incorporated herein as if they were set out in full.

48 In *Railroad Ventures, Inc. v. Surface Transp. Bd.*, 299 F.3d 523 (6th Cir. 2002)

(*"Railroad Ventures"*) at 552, the 6th Circuit held

"Thus, while a railroad may 'abandon any part of its railroad lines' under 49 U.S.C. §10903(a)(1)(A), the STB is permitted to authorize a prospective buyer under the OFA provisions to purchase 'that part of the railroad line to be abandoned' under 49 U.S.C. §10904(d). The line owner can seek authority to abandon all or a part of its rail line, but if it does so, then, pursuant to §10904(f)(1)(B), a qualified OFA purchaser is entitled to determine how much of the line it wishes to acquire. Once the offeror seeks to purchase the entire rail line or a portion thereof as described in the abandonment petition, 49 U.S.C. §10904(c), the STB is then statutorily obligated to render a decision setting price and other sale terms as to what the offeror seeks to buy, within thirty days of a request to set conditions. 49 U.S.C. §10904 (f)(1)(A). Under this statutory provision, then, it necessarily follows that neither the abandoning rail carrier nor the STB can alter or amend what the OFA buyer has offered to buy; rather, the STB can only set the terms on what the offeror has proposed to purchase.

In short, once the owner of a rail line submits a petition seeking the STB's authority to abandon the line, it must allow a prospective OFA purchaser the opportunity to determine how much of the line to acquire, as the line is described in the abandonment petition. Thus, at the point of filing the abandonment petition the abandoning rail line owner cannot reduce or diminish the rail line or the nature of the property interests associated with the line. Because a rail line owner is subject to the STB's jurisdiction until such time that the line has been properly abandoned or sold, it therefore must maintain the status quo with respect to its property interests in the rail line as described in its abandonment petition." (Emphasis added.)

A. DEFENDANTS' ACTIONS ARE CAUSING PLAINTIFF GRAVE, SUBSTANTIAL, IMMEDIATE, CERTAIN AND IRREPARABLE HARM

49. The Defendants' actions are causing grave, substantial, immediate, certain and irreparable harm to Plaintiff

50. Because of its previous filing and the ongoing road project, it is inevitable that

BNSF must either file another proper request for an individual exemption (for which it cannot qualify) or submit a new Abandonment Application. It is also inevitable that Kessler will have the right to file a Notice of Intent to File an Offer of Financial Assistance to purchase the Line. The ongoing construction, alteration, or planned alteration of the subject Line is causing significant damage and diminishing its ability to for use to provide proper rail service.

51. In *Railroad Ventures* at 552, the 6th Circuit held that:

“at the point of filing the abandonment petition the abandoning rail line owner CANNOT reduce or diminish the rail line or the nature of the property interests associated with the line. Because a rail line owner is subject to the STB’s jurisdiction until such time that the line has been properly abandoned or sold, it therefore MUST MAINTAIN THE STATUS QUO with respect to its property interests in the rail line as described in its abandonment petition.” (Emphasis added)

52. The Defendants’ actions are reducing or diminishing the rail line or the nature of the property interests associated with the Line

53. The harm Kessler is suffering is grave, substantial and certain. To exercise the statutory right of an OFA, Kessler will be harmed because the cost to restore those portions of the Line that have been destroyed, is enormous [It will cost around \$200 per linear foot to replace the several thousand feet of Line that has been salvaged (2,000 feet would cost \$400,000) It will cost \$200,000 + to replace the Shield’s Spur switch that was removed]

54. The harm Kessler is suffering, is immediate and certain. On at least three separate occasions since the Board’s February 7, 2008 Order directing BNSF to stop all

salvage activities on the Line, portions of the Line have been destroyed or impaired

55. **The harm Kessler is suffering is irreparable.** ODOT is an agency of the State of Oklahoma. Oklahoma is a sovereign entity, and as such, it has immunity from suit for monetary damages. The absence of any type of remedy for monetary damages has been held to constitute "irreparable harm." See *Dakota, Minn. & Eastern R.R. Corp. v. South Dakota*, 236 F. Supp. 2d 989, (D.S.D., 2002), wherein that court made the following statements

"Since the instant action is one against the State, money damages are not recoverable. The threat of unrecoverable economic loss does qualify as irreparable harm. See *Baker Elec. Coop., Inc. v. Chaske*, 28 F.3d 1466, 1473 (8th Cir. 1994)." *Dakota* at 1013. (Emphasis added)

56. **Kessler is likely to prevail on the merits:**

A. BNSF was previously ordered by the Board to stop all salvaging activities on the Line and did not. BNSF's Petition for Exemption to Abandonment has now been made void ab initio. With BNSF's apparent acquiescence, permanent alteration of the Line as a part of the national railway system, is occurring at the hands of the Defendants, their officers, agents, servants, employees, attorneys, contractors, and all persons acting in active concert or participation with the Defendants. These salvaging activities are unlawful, for per 49 U.S.C. §10903, no person may abandon (salvage) a Line without Board authority.

B. BNSF's NOE to abandon the Line has been rejected by the Board since the Board found that it clearly contained false and misleading statements and the Board is required to reject NOE's that contain false and misleading statements.

C Because the ongoing road project and contractual agreements between BNSF and ODOT, BNSF will inevitably file another abandonment proceeding. Kessler has a statutory right under 49 U.S.C. §10904 to make an OFA to purchase the Line.

D The 6th Circuit in *Railroad Ventures* made it clear that no one may diminish the nature of, or property interests associated with, a Line, as of the date a request to abandon a Line has been filed with the Board.

57 BNSF will not be harmed by the Stay. The STB, in its February 7, 2008 Decision, stayed BNSF's consummation of abandonment of the Line. That stay of consummation of the abandonment has been made permanent by the June 5, 2008 Order reopening and voiding the abandonment. What Kessler is asking this Court to do, is to give effect to the STB's Order voiding the NOE and preventing further damage and injury to the subject Line.

58 The Stay will be consistent with the public interest. The public interest will be served by enforcing an Order issued by the STB, and by preventing the Defendants from violating Federal Law. The public interest will be further served by preserving the Line and the exclusive jurisdiction of the STB, a federal regulatory agency, for the STB has a "statutory duty to preserve and promote continued rail service, [citations omitted] and, specifically in the context of the "abandonments or discontinuance of rail service," that one of its "function[s] . . . is to provide the public with a degree of protection against the unnecessary discontinuance, cessation, interruption, or obstruction of available rail service." *New York Cross Harbor R.R. v. Surface Transp. Bd.*, 374 F.3d 1177, 1187 (D.C. Cir.

2004). There are strong national, statutory and Board policies favoring the preservation of rail services, and the provision of adequate service for rail shippers. As the D C Circuit pointed out in the *Cross Harbor* case, at p 1187, depriving a rail shipper of the availability of rail service options that it already has, would require a very strong showing that such action is in the public interest.

CLAIM ONE

INJUNCTIVE RELIEF AGAINST BNSF

59 All the factual allegations contained in the preceding paragraphs are incorporated herein as if they were set out in full

60 BNSF has knowingly and intentionally violated 49 U S C § 10903 by permitting the Line to be salvaged, and/or by reducing or diminishing, the rail line, or the nature of the property interests associated with the Line, without Board authority.

61. BNSF knowingly and intentionally violated the Board's February 7, 2008 Order directing BNSF to cease all further abandonment activities on the Line until such time as the Board ruled on Kessler's Petition to Reopen and now made permanent by the Board's June 5, 2008 Order, by permitting, condoning, or by not preventing, further activities on the Line (including possible salvage), and/or by reducing or diminishing, the rail line, or the nature of the property interests associated with the Line, without Board authority.

WHEREFORE, Plaintiff asks this Court

A Issue an Order enjoining BNSF, any of BNSF's officers, agents, servants,

employees, attorneys, contractors, and all persons acting in active concert or participation with them, from any further activities in the nature of salvage or alteration of the subject Line pending Board consideration of Kessler's OFA,

B Issue an Order enjoining BNSF, any of BNSF's their officers, agents, servants, employees, attorneys, contractors, and all persons acting in active concert or participation with them, from reducing or diminishing, the rail line, or the nature of the property interests associated with the Line, pending Board consideration of Kessler's OFA,

C Award Kessler reasonable attorney fees,

D Grant such other and further relief as this Court deems just and equitable

CLAIM TWO

PROSPECTIVE INJUNCTIVE RELIEF AGAINST ODOT

62 All the factual allegations contained in the preceding paragraphs are incorporated herein as if they were set out in full

63 ODOT has knowingly and intentionally violated 49 U.S.C. § 10903 by contracting with contractors for the purpose of salvaging the Line, and/or the purpose of said contracts results in, or may result in, a reduction or diminution of, the rail line, or the nature of the property interests associated with the Line, without Board authority

64 ODOT continued construction of its road project and its continued destruction and alteration of the subject line and its attendant facilities is contrary to the June 5, 2008 Order of the STB and knowingly and intentionally interferes with and affects the operation

of the subject Line as a part of the National Railway system. Such actions results in, or may result in, a reduction or diminution of, the rail line, or the nature of the property interests associated with the Line, without Board authority.

65 Despite the lack of authority from the STB authorizing the use of the Chickasha Subdivision right of way for the ODOT road project, BNSF and/or ODOT continues its road construction project in such a manner as to permanently alter the subject Line.

CLAIM THREE

DECLARATORY RELIEF AS TO BNSF CONTRACTUAL AGREEMENTS WITH ODOT

66 All the factual allegations contained in the preceding paragraphs are incorporated herein as if they were set out in full.

67 Upon information and belief, BNSF and ODOT have entered into certain agreements with regard to the proposed abandoned property whereby the right of way after abandonment will be conveyed or transferred away from BNSF for use in the ODOT road project and the subject Line will be removed or salvaged. This agreement of conveyance or anticipated transfer impairs the operation of federal statutes granting a right to make an OFA for the Rail Line and impedes a potential OFA candidate's ability to perform rail operations by burdening that potential operation with reconstruction of the subject Line and/or removing any contractual right preventing the continuance of rail service, resulting in, or may result in, a reduction or diminution of, the rail line, or the nature of the property interests associated with the Line, if done without reference to STB authority.

68 Plaintiff acknowledges that while declaratory relief may lie against BNSF, but not necessarily against the State Defendants pursuant to the Eleventh Amendment, declaratory relief as to BNSF will determine the validity of the agreement and then prospective injunctive relief should be available to prevent the destruction of the subject Line and its removal from the National Rail system.

69. Declaratory relief is available against Defendant BNSF regarding any such agreements or contractual issue.

WHEREFORE, Plaintiff asks this Court.

A Issue an Order enjoining BNSF, ODOT, their officers, agents, servants, employees, attorneys, contractors, and all persons acting in active concert or participation with them, from any further activities which may affect the Line in any way, until the Board rules on Kessler's to be anticipated OFA;

B Issue a declaratory judgment declaring as a violation of Federal law any certain agreements between BNSF and ODOT with regard to the proposed abandoned property whereby the right of way after abandonment will be conveyed or transferred away from BNSF for use in the ODOT road project and Line will be removed or salvaged unless such agreement is conditioned upon protecting right of potential persons who may make offers of financial assistance for such proposed abandoned Line .

B Award Kessler costs, reasonable attorney fees, and expenses of the litigation,

C Grant such other and further relief as this Court deems just and equitable

against appropriate parties under Fed Rul Civ Pro 54(c)

Respectfully submitted,



SIGNATURE OF COUNSEL

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(405) 366-1234

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Attorney for Plaintiff

Edwin Kessler

CERTIFICATE OF SERVICE

I hereby certify that I electronically transmitted this document to the Clerk of the United States District Court for the Western District of Oklahoma using the ECF System for filing and transmittal of notice of electronic filing to the following ECF registrants

Hugh Rice

Rod Cook

William P. Tunnel, Jr.

Sidney Strickland, Jr

Norman Hill

Eric Hocky

Ellen Milcic

on the 27th day of JUNE, 2008



MICHAEL SALEM

D:\WP51\Kessler\BNSF\Complaints\JB OK usdc injunction complaint 6-27-2008 vpxd

37795
EB

SERVICE DATE – JUNE 5, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No AB-6 (Sub-No 430X)

**BNSF RAILWAY COMPANY—ABANDONMENT EXEMPTION—IN OKLAHOMA
COUNTY, OK**

STB Docket No AB-1040X

**STILLWATER CENTRAL RAILROAD, INC.—DISCONTINUANCE OF SERVICE
EXEMPTION—IN OKLAHOMA COUNTY, OK**

Decided June 3, 2008

On February 21, 2007, Edwin Kessler (Mr. Kessler) filed a petition to reopen the Board's decision in these proceedings served on January 26, 2007 (January 2007 decision). The petition to reopen will be granted as to the abandonment proceeding based on new evidence, and the related notice of exemption will be rejected as void ab initio. The petition will be denied as to the discontinuance proceeding. Other requests for relief will be denied as moot.

BACKGROUND

On September 23, 2005, BNSF Railway Company (BNSF) and Stillwater Central Railroad, Inc. (SLWC) filed notices invoking the class exemption in 49 CFR 1152 Subpart F for lines that have been "out-of-service" for at least 2 years in order for BNSF to abandon approximately 2.95 miles of rail line between milepost 539.96 and milepost 542.91 in Oklahoma City, Oklahoma County, OK (the Line) (in STB Docket No AB-6 (Sub-No 430X)), and for SLWC to discontinue service over two separate segments of the Line, totaling 0.95 miles (STB Docket No AB-1040X).¹ The railroads sought abandonment and discontinuance authority to facilitate a proposed highway relocation project. Notice of the filings was served and published in the Federal Register on October 13, 2005 (70 FR 59802), and the exemptions became effective on November 12, 2005.

¹ SLWC obtained operating authority as to the 0.91-mile line segment between milepost 542.0 and milepost 542.91 and the 0.04-mile line segment between milepost 539.96 and milepost 540.0. See Stillwater Central Railroad, Inc.—Lease Exemption—The Burlington Northern and Santa Fe Railway Company, STB Finance Docket No. 34610 (STB served Jan. 19, 2005) (Stillwater).

STB Docket No AB-6 (Sub-No 430X), et al

On November 7, 2005, Oklahoma State Representative Al Lindley and Bio-Energy Wellness Center (Bio-Energy) filed comments urging that the notices be rejected. On November 9, 2005, Bio-Energy and North American Transportation Institute (NATI) filed a joint petition to reject the notices of exemption, to which the railroads jointly replied

In the January 2007 decision, the Board denied the Bio-Energy/NATI request to reject BNSF's notice of exemption, but granted their request to reject SLWC's notice of exemption. The Board found that SLWC could not avail itself of the class exemption, because it had not acquired the right to operate the two segments until just 9 months prior to filing the notice. See Stillwater supra, note 1. On its own motion, however, the Board granted SLWC an individual exemption to discontinue operations on the segments

On February 21, 2007, Mr Kessler filed the present petition to reopen the January 2007 decision, asking the Board to reject BNSF's abandonment exemption notice. On March 7, 2007, BNSF filed a reply in opposition and a request to strike or reject the petition as an improper reply to a reply

In a decision served on February 27, 2007, the Board denied a request from Mr Kessler for an extension of time to file, and his petition to toll the due date for filing, an OFA. The Board also rejected, as neither persuasive nor supported by the cases cited, Mr Kessler's argument that the January 2007 decision rejecting SLWC's notice of exemption for discontinuance authority obviated the effectiveness of BNSF's abandonment exemption and permitted the filing of a new OFA to purchase the Line.

Mr Kessler filed a petition for an emergency stay of the effective date of the abandonment exemption and a supplement to the petition to reopen on March 21, 2007. Upon reopening, Mr Kessler seeks (1) rejection of BNSF's notice of abandonment exemption or revocation of BNSF's exemption, (2) revocation of SLWC's discontinuance exemption; and (3) the granting of new individual exemptions on the Board's own motion, followed by the opportunity to file an OFA to purchase the Line. Also on March 21, 2007, Mr Kessler filed a motion for protective order. On March 26, 2007, BNSF filed a reply in opposition to the stay petition and a request to strike or reject the supplement as an improper reply to a reply. BNSF urged the Board to reject Mr. Kessler's new evidence as hearsay and speculative, but neither admitted nor denied the factual allegation that the Line had carried local traffic during the 2-year "out-of-service" period

On February 7, 2008, the Board directed BNSF to respond to Mr Kessler's evidence alleging that BNSF had served shippers on the Line during the 2-year period prior to filing the notice, and directed BNSF not to consummate the abandonment until the Board ruled on Mr Kessler's petition to reopen. BNSF filed a reply on February 12, 2008, to which Mr Kessler responded on February 19, 2008. On February 15, 2008, Mr Kessler filed comments alleging that BNSF had begun dismantling the Line and asking that BNSF be required to cease and desist from prematurely consummating the abandonment. BNSF replied to these comments on

STB Docket No AB-6 (Sub-No 430X), et al

February 20, 2008 Mr Kessler supplemented his comments on February 22, 2008, and BNSF responded to this supplementary filing on March 12, 2008. On March 24, 2008, Mr. Kessler filed a formal request that the Board order BNSF to cease and desist from any further salvage activities on the Line, and a second supplement to his comments. On April 8, 2008, BNSF filed a reply to this request, and on April 11, 2008, Mr Kessler filed a motion for clarification of the Board's February 7, 2008 decision. On May 1, 2008, BNSF filed a reply to Mr. Kessler's motion for clarification, arguing that the February 7, 2008 decision was clear on its face and does not require clarification.

POSITIONS OF THE PARTIES

Mr Kessler contends that both notices of exemption contained false and misleading information.² Specifically, Mr Kessler claims that new evidence demonstrates that BNSF served a shipper located on the Line within the 2-year period prior to September 23, 2005 (the filing date of the notice of exemption), and that it served another shipper as recently as February 27, 2007. Additionally, he contends that, contrary to SLWC's statements and the Board's prior finding, new evidence demonstrates that SLWC possessed operating authority over the entire 295-mile Line, not just the segments at each end.

To show that BNSF provided service on the Line within the 2-year period prior to September 23, 2005, Mr. Kessler has submitted a verified statement of Thomas Elmore, spokesperson for NATI. Attached to Mr Elmore's verified statement are copies of two letters from BNSF, dated August 22 and September 23, 2005, that Mr Elmore acquired from the Oklahoma Department of Transportation through a Freedom of Information Act request.³ In the letters, BNSF described a construction project that would remove a crossing diamond near Mid-States Lumber Company (Mid-States), requiring the industry track accessing Mid-States to be temporarily taken out of service. In the August 22 letter, BNSF stated that it "currently serves Mid-States via this track" and offered to transload lumber for Mid-States at an alternate location, provided that the State of Oklahoma reimburses BNSF for the additional expense of transloading. The letter concluded by asking representatives of Mid-States and the State to sign the letter "agreeing to the conditions noted above . . . to commence the transload process." In the September 23 letter, BNSF informed the State that "the estimated cost for transloading cars for

² Mr. Kessler also asserts that the Board committed material error by improperly granting BNSF abandonment authority prior to granting SLWC discontinuance authority. The Board addressed and rejected this argument in its decision served February 27, 2007, and Mr Kessler's claim of material error must be rejected here as well. Nonetheless, as subsequently discussed, Mr Kessler's petition to reopen the abandonment proceeding will be granted on other grounds.

³ BNSF does not contend that these letters were "reasonably available" to Mr Kessler before the Board's January 2007 decision. Accordingly, we treat them as "new evidence" for purposes of the petition to reopen.

STB Docket No. AB-6 (Sub-No. 430X), et al.

[Mid-States] is \$22,800.00" based on an estimate of 24 cars per year. Mr. Kessler claims that these 2005 letters constitute verifiable proof that Mid-States—located one block north of Producers Co-Op Oil Mill (Producers) and connected to the Line by a lead near Producers' facility—received rail service from BNSF within the 2-year period prior to September 23, 2005

As for recent service, Mr. Elmore states that he has seen two photographs taken by Mr. Kessler showing rail cars at Producers' facility on February 18, 2007, but no longer at that location on February 27, 2007. In support, attached to Mr. Elmore's verified statement are two photographs allegedly taken by him on February 27, 2007. According to Mr. Elmore, one of the photographs shows a BNSF locomotive inside Producers' facility delivering cars, while the other shows a BNSF locomotive departing that facility without cars. Mr. Kessler acknowledges that Producers' facility is located adjacent to both a Union Pacific Railroad Company (UP) line and another BNSF line, known as the Red Rock Line, but he asserts that, because there is no lead connecting Producers' facility to the UP line or the Red Rock Line, BNSF must have used the subject Line to serve Producers.

To demonstrate that SLWC possessed operating authority over the entire Line, Mr. Kessler has submitted a verified statement along with a photograph and diagram by Gail Poole. According to Ms. Poole, the photograph was taken on February 15, 2007, and shows a train being pulled by two BNSF locomotives, allegedly leased to SLWC, on the portion of the Line that was not leased to SLWC. Mr. Kessler argues that this evidence demonstrates that SLWC misled the Board about its authority and that the Board's January 2007 decision erred in finding that SLWC did not have authority to operate over the entire Line.

Additionally, Mr. Kessler claims that two shippers along the Line, Boardman Company (Boardman), a manufacturer of large industrial condensers at milepost 541.75, and Producers, which makes cotton seed oil, have privately indicated that they do not want to lose rail freight service. Mr. Kessler has also submitted a letter from MDRC, a company that maintains and repairs rail cars, which expresses an interest in locating a facility on the Line, stating that "access to two Class I carriers is highly desirable."⁴

Finally, Mr. Kessler alleges that BNSF has engaged a contractor to begin dismantling the Line and asks the Board to require BNSF to cease and desist from prematurely consummating the abandonment. Mr. Kessler has also submitted photographs and an affidavit from Mr. Elmore

⁴ We note that Mr. Kessler's claim that Boardman and Producers do not want to lose rail freight service is undercut by the fact that neither Boardman nor Producers has filed pleadings in opposition to BNSF's notice of exemption or in support of the petition to reopen. And the letter indicating that MDRC may be interested in locating a facility on the line is also irrelevant for our purposes here—determining what traffic may have moved in the past—and in any event is speculative in nature.

S1B Docket No AB-6 (Sub-No 430X), et al

stating that he observed a crew cutting the rails on the Line and describing his conversations with the foreperson

In response to Mr. Kessler's allegations, BNSF states that the last shipment over the Line was to Boardman Lumber in July-August 2003, and that there have been no shipments over the Line since that time. BNSF maintains that Producers is served from the Red Rock Line, not the Line to be abandoned here, and that Producers had been served from the Red Rock Line for more than 2 years prior to the filing date of its notice of exemption.⁵ BNSF raises questions about the evidentiary value of the photographs Mr. Kessler has submitted and speculates that they must have been taken on the Red Rock Line. BNSF states, without elaboration, that the two letters regarding service to Mid-States in 2005 dealt with a different project and different track.

With respect to Mr. Kessler's allegation that it is dismantling the Line, BNSF states that it "cut the line" on January 25, 2008, when it had authority to consummate the abandonment,⁶ but maintains that it has not conducted any salvage work since then. BNSF adds that it has not issued a signed contract for any salvage work, nor will it do so until the Board gives it permission to move ahead with consummation of the abandonment. BNSF states that any salvage activity occurring in February 2008 was done without its direction or permission, and asserts that it has since contacted local personnel operating in the area and instructed them not to take any action related to salvaging the Line.

DISCUSSION AND CONCLUSIONS

Petition to Reopen⁷ Under 49 CFR 1152.25(c)(4), the Board will grant a petition to reopen an administratively final action only upon a showing that the Board's action would be affected materially because of material error, new evidence, or substantially changed circumstances. As discussed below, we conclude that the record before us demonstrates clear grounds for reopening the abandonment proceeding based on new evidence, but no basis for reopening the discontinuance proceeding.

⁵ In its March 12, 2008 filing, BNSF has submitted a map to illustrate how it serves Producers over the Red Rock Line. The map shows that cars destined for Producers are pulled from the Red Rock Line over a spur and onto the subject Line, from which the cars then access the Producers' switch. A notation on the map explains that "[n]ear-future track construction plans" call for the industry tracks serving Producers and Mid-States to "be re-aligned, including moving switches to location[s] on the Red Rock [Line]."

⁶ By decisions served October 6, 2006 and January 25, 2008, the Board granted BNSF's requests for an extension of time to consummate the abandonment.

⁷ Mr. Kessler purports to file a petition "to reopen/to reconsider" the January 2007 decision. But because the Board's rules do not permit petitions for reconsideration of entire Board decisions in abandonment or discontinuance proceedings, see 49 CFR 1152.25(e)(2), we will treat Mr. Kessler's petition as a petition to reopen under 49 CFR 1152.25(c)(4).

STB Docket No. AB-6 (Sub-No. 430X), et al.

A. The abandonment proceeding.

The 2-year out-of-service class exemption was adopted to provide carriers with an expedited procedure for abandoning rail lines in those situations where we would undoubtedly grant the requested relief if the facts were as alleged by the carrier. See The St. Louis Southwestern Railway Company—Abandonment Exemption—in Gasconade, Maries, Osage, Miller, Cole, Morgan, Benton, Pettis, Henry, Johnson, Cass, and Jackson Counties, MO, Docket No. AB-39 (Sub-No. 18X), et al., slip op. at 2 (ICC served Apr. 1, 1994) (St. Louis). In administering the class exemption, the Board depends on the accuracy of the information in the carrier's certification. To ensure the integrity of the class exemption procedure, our regulations provide that "[i]f the notice of exemption contains false or misleading information, the use of the exemption is void ab initio and the Board shall summarily reject the exemption notice." 49 CFR 1152.50(d)(3). This rule contains no exception for de minimis errors in the notice of exemption concerning usage of the line. St. Louis, slip op. at 3.

As to the BNSF abandonment, we conclude that, in light of 49 CFR 1152.50(d)(3), reopening of the proceeding is warranted on the basis of new evidence introduced by Mr. Kessler and our analysis of that evidence and BNSF's response. Mr. Kessler has repeatedly alleged that BNSF served Producers during the 2-year certification period, and that Producers could only be accessed via the Line. As noted in its February 12, 2008 reply to the Chairman's order, BNSF denies that it has served any customer on the Line and states that "Producers' Coop is served from the Red Rock Subdivision and has been for more than two years prior to the filing of AB-6 Sub-No. 430." But BNSF's March 12, 2008 reply to Mr. Kessler's supplemental comments indicates that the carrier cannot access Producers from the Red Rock Line directly, at least not until it realigns Producers' industry track. And more importantly, in that filing BNSF explains in detail how it accesses Producers via the Red Rock Line and has submitted a map to illustrate this service. BNSF's own illustration shows that, to serve Producers via the Red Rock Line, it must operate over the Line at issue here for a short distance when switching between the Red Rock Line and the industrial spur leading to Producers. Finally, as indicated, BNSF explained in its February 12, 2008 reply that it had been serving Producers via this route prior to filing its notice of exemption in this proceeding. Consequently, BNSF's own evidence shows that it operated over a portion of the Line during the 2-year period prior to September 23, 2005, confirming Mr. Kessler's allegation that BNSF's certification in its notice (that no local traffic had moved over the Line for at least 2 years prior to the filing date) was false or misleading.⁸

Furthermore, despite multiple opportunities, BNSF has failed to provide an adequate explanation for the 2005 letters, in which BNSF seems to indicate that it provided rail service to

⁸ See St. Louis, slip op. at 1-3 (concluding that carrier's 2-year out-of-service certification contained false and misleading information because carrier had moved three shipments over a 0.71-mile segment of a nearly 200-mile line slated for abandonment).

STB Docket No AB-6 (Sub-No 430X), et al

Mid-States via the Line within the 2-year period prior to September 23, 2005. Indeed, in response to our February 7, 2008 order directing BNSF to address Mr. Kessler's new evidence, BNSF does not dispute that it served Mid-States during the 2-year period. Rather, BNSF merely states that the letters "deal[t] with a different project and different track," without explaining in any detail what other track was involved and how else BNSF could have served Mid-States during that period other than over the Line. We cannot credit BNSF's vague assertion, given that the map BNSF submitted with its March 12, 2008 reply shows that the industry track serving Mid-States connects only with the subject Line.

In sum, the new evidence before the Board—including the evidence submitted by BNSF itself—shows that BNSF moved local traffic over the Line for one or more shippers during the September 2003 to September 2005 time period. This means that its certification in September 2005 was false or misleading. As a result, we will reopen the January 2007 decision and reject BNSF's notice of exemption as void ab initio.

BNSF is not foreclosed from filing a properly supported petition for an individual exemption or an application to abandon the Line under a new docket number. We decline, however, Mr. Kessler's brief invitation to grant BNSF, on our own motion, an individual abandonment exemption. The new evidence before us here shows the presence of some undefined level of local traffic on the Line. Before considering whether to grant an individual exemption under 49 U.S.C. 10502(a), we would require a more developed record on that issue than we now have.

B. The discontinuance proceeding

Despite Mr. Kessler's arguments to the contrary, the photograph and verified statement from Gail Poole fail to establish that SLWC is authorized to operate the entire Line (and not just the segments at each end), or that SLWC misled the Board about its authority. SLWC's operating authority is clearly set out in Stillwater. That decision authorized SLWC to operate only the 0.91-mile line segment between milepost 542.0 and milepost 542.91 and the 0.04-mile line segment between milepost 539.96 and milepost 540.0. Even if a SLWC train were on the portion of the Line not leased to it, this would not enlarge the scope of its operating authority under Stillwater. Mr. Kessler's allegations with respect to the scope of SLWC's authority are therefore without merit, and his request to reopen the discontinuance proceeding and revoke SLWC's exemption will be denied.

Other Matters. Mr. Kessler has sought various other forms of relief in a petition for emergency stay, a motion for a protective order, and a request for a cease and desist order. Because we are granting Mr. Kessler's petition to reopen the abandonment proceeding and rejecting BNSF's notice of exemption as void ab initio, these additional requests for relief have been rendered moot and will be denied as such. Likewise, BNSF's motions to strike various pleadings received from Mr. Kessler will be denied in the interest of compiling a complete record. (We note that the Board's ruling here relies primarily on the evidence submitted by

STB Docket No AB-6 (Sub-No 430X), et al

BNSF itself) Finally, other issues and arguments raised by the parties have not been addressed here because they are not relevant to our findings

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered

1 The petition to reopen the Board's January 2007 decision as to the abandonment exemption is granted and BNSF's notice of exemption is rejected as void ab initio

2 The petition to reopen the January 2007 decision as to the discontinuance exemption is denied

3 BNSF's motions to strike are denied

4 All other pending requests for relief are denied as moot

5 This decision is effective on its date of service

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey

Anne K. Quinlan
Acting Secretary

VERIFIED AFFIDAVIT OF THOMAS ELMORE
February 17, 2008

1. I am over the age of eighteen and am competent to testify to the matters stated in this Affidavit.

2. On February 14, 2008, in Oklahoma City, Oklahoma at approximately 2:30 p.m., I observed and photographed a contractor crew using rail saws and other equipment typical of railroad salvage operations cutting rails on the BNSF, former Frisco, rail line near the eastern limit of Oklahoma City Union Station yard. I observed this work proceeding on the track between South Shields Boulevard and South Robinson Avenue, approximately corresponding to Mile Posts 540.25 and 540.45, respectively. This line is the subject of Surface Transportation Board Docket Number AB-6 430X, Case Title: BNSF RAILWAY COMPANY -- ABANDONMENT EXEMPTION -- IN OKLAHOMA COUNTY, OK.

3. On February 14, 2008, shortly after 2:30 p.m., I made contact with an individual who identified himself as "Wesley," foreman of the crew cutting the rails on the BNSF, former Frisco, rail line. I told him of the STB directive of February 7, 2008, Docket Number AB-6 430X, ordering BNSF not to consummate abandonment. He indicated that he knew nothing of the February 7 order and had been proceeding with dismantling the track pursuant to a contract with BNSF. He telephoned others to discuss the matter.

4. On February 14, 2008, at approximately 3:00 p.m., an individual arrived who identified himself as BNSF Roadmaster Corey Burkhardt. He immediately indicated that he had a contract to salvage the BNSF, former Frisco, rail line segment and had no knowledge of the STB directive of February 7, 2008, Docket Number AB-6 430X, ordering BNSF not to consummate abandonment. I urged him to check the STB website to verify the February 7 order.

I SOLEMNLY AFFIRM under the penalties of perjury and upon personal knowledge that the contents of the foregoing Affidavit are true and correct to the best of my knowledge and belief.

Thomas Elmore 2-17-08
Thomas Elmore Date

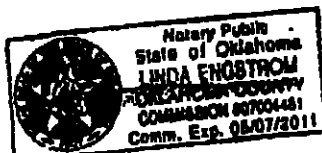
STATE OF OKLAHOMA, Oklahoma COUNTY, to wit:

I HEREBY CERTIFY, that on this 17th day of February, 2008
before me, a Notary Public of said State, personally appeared Thomas Elmore, known to me or
satisfactorily proven to be the person whose name is subscribed to the within Affidavit, and who
acknowledged that he executed the same, for the purposes therein contained.

AS WITNESS my hand and notarial seal.

My commission expires: 5/7/2011

Linda Enstrom
Notary Public



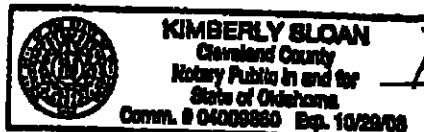
VERIFIED AFFIDAVIT OF THOMAS ELMORE
March 5, 2008

1. I am over the age of eighteen and am competent to testify to the matters stated in this Affidavit.

2. On the afternoon of February 26, 2008, I observed and photographed a newly constructed cantilevered railway crossing signal at the S. Agnew Avenue crossing of the BNSF, former Frisco line in Oklahoma City, Oklahoma. The base of the structure of this signal was placed directly in the path of the BNSF, former Frisco rail line MP 542.8, as the photos accompanying this affidavit will show. *This rail line is the subject of Surface Transportation Board case: BNSF Railway Company - Abandonment Exemption -- In Oklahoma County, OK, AB-6 (Sub-No. 430 X)*

3. The newly constructed crossing signal was not present at my last visit to this location on January 28, 2008. I spoke on the afternoon of February 26, 2008 with Mr. Don R. Moad of Ram Products, Incorporated, at 1731 S. Agnew Avenue, Oklahoma City, OK 73108 Mr Moad told me he and others at his business had observed the erection of the new signal mast by work crews on Friday, February 22, 2008.

I SOLEMNLY AFFIRM under the penalties of perjury and upon personal knowledge that the contents of the foregoing Affidavit are true and correct to the best of my knowledge and belief.



Thomas Elmore
Thomas Elmore

3-06-08
Date

STATE OF OKLAHOMA, Cleveland COUNTY, to wit:

I HEREBY CERTIFY, that on this 6th day of March, 2008 before me, a Notary Public of said State, personally appeared Thomas Elmore, known to me or satisfactorily proven to be the person whose name is subscribed to the within Affidavit, and who acknowledged that he executed the same, for the purposes therein contained.

AS WITNESS my hand and notarial seal.

My commission expires: 10-29-08

Kimberly Sloan
Notary Public

VERIFIED AFFIDAVIT OF THOMAS ELMORE
March 20, 2008

1. I am over the age of eighteen and am competent to testify to the matters stated in this Affidavit.

2. On the afternoon of March 19, 2008, in Oklahoma City, Oklahoma, I observed that the switch and turnout at approximately MP 540.15 on the BNSF, former Frisco rail line, connecting that line to the BNSF Red Rock Subdivision interchange ramp, had been recently removed. At a previous visit to this site on February 26, 2008, I had observed the switch and turnout still in place on the BNSF, former Frisco line. I made photographs of this line segment on both occasions, some of which accompany this affidavit. *This rail line is the subject of Surface Transportation Board case: BNSF Railway Company - Abandonment Exemption - In Oklahoma County, OK, AB-6 (Sub-No. 430 X).*

I SOLEMNLY AFFIRM under the penalties of perjury and upon personal knowledge that the contents of the foregoing Affidavit are true and correct to the best of my knowledge and belief.



KIMBERLY SLOAN

Cleveland County

Notary Public in and for

State of Oklahoma

Comm. # 04006880 Exp. 10/29/08

Thomas Elmore

3-20-08
Date

STATE OF OKLAHOMA, Cleveland COUNTY, to wit:

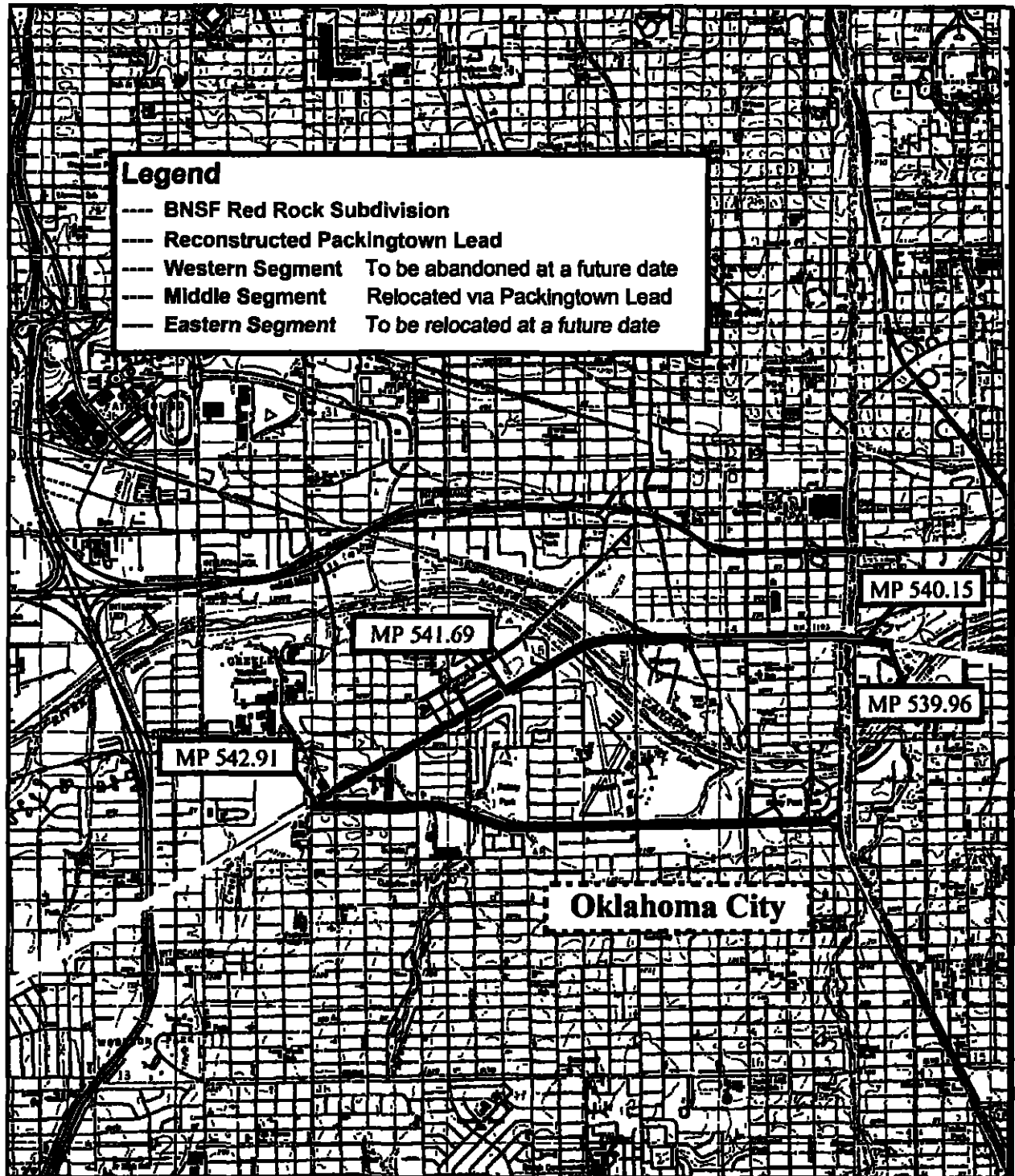
I HEREBY CERTIFY, that on this 20th day of March 2008, before me, a Notary Public of said State, personally appeared Thomas Elmore, known to me or satisfactorily proven to be the person whose name is subscribed to the within Affidavit, and who acknowledged that he executed the same, for the purposes therein contained

AS WITNESS my hand and notarial seal.

My commission expires: 10-29-08

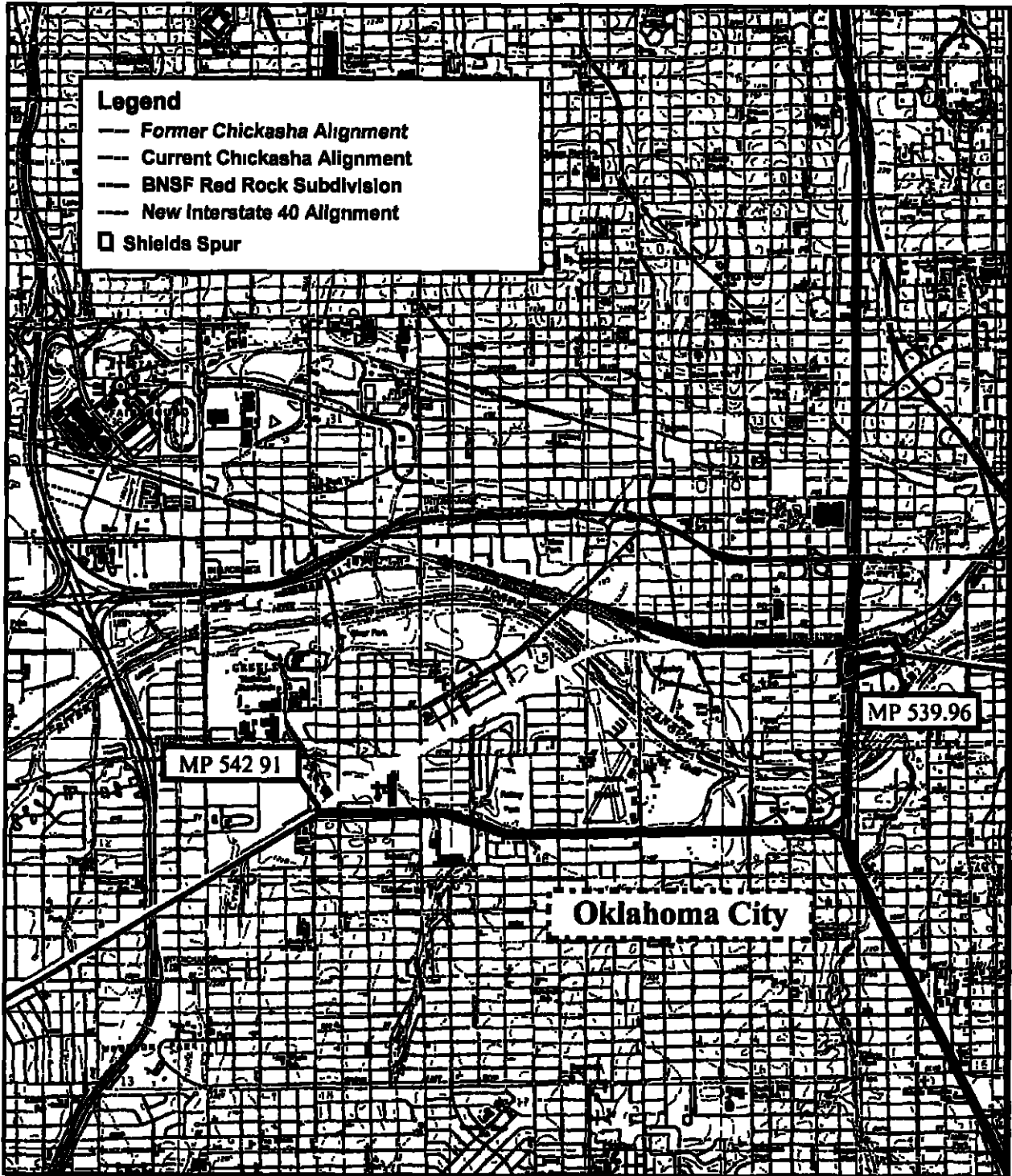
Kimberly Sloan
Notary Public

Exhibit 2



Source: U.S. Department of the Interior
U.S. Geological Survey
Oklahoma City Quadrangle – Oklahoma – 7.5-minute Series (Topographic)

Exhibit 3



Source: U.S. Department of the Interior
U.S. Geological Survey
Oklahoma City Quadrangle – Oklahoma – 7.5-minute Series (Topographic)